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SOME ANTITRUST PROBLEMS IN TERMINATING FRANCHISES

GEORGE J. WADE*

Accessibility of even the most remote sections of the country to the nationally promoted brand has drastically affected distribution methods. For a while it seemed that the chain store would eliminate the small proprietorship from any significant place in retailing, but recently the small businessman has found a place as the franchisee for one or more nationally promoted products. Since the inception and operation of a franchising scheme have often been discussed, we shall consider some antitrust factors which affect any decision to terminate a franchise.¹ Specifically, our analysis will focus upon terminations, or refusals to deal, involving resale price maintenance and certain other restrictions, and upon expanded treble-damage liabilities and the possibility of a disgruntled terminated franchisee bringing a class action under the amended Federal Rule of Civil Procedure 23.²

INTRODUCTION

In setting up a franchise, the parties, in their agreement, should take into account what may happen when one of them decides that it should be terminated.³ Unfortunately, many franchisors seem to think the problems can be solved by merely writing clauses into contracts permitting termination on short notice by either party. Antitrust problems will persist, however, since the courts will not allow the franchisor to enforce an objectionable course of operations by exercising the unilateral right of termination which he has built into the contract.

The cut-off franchisee has always had the prerogative to go to the Federal Trade Commission (hereinafter FTC), or to the Antitrust Division of the Justice Department, with a complaint on the basis of which an action could be brought. But that, as a practical matter, requires proof of an antitrust violation affecting a significant part of the nation's commerce. Recent cases, however, indicate that the ex-dis-

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¹ Specific legislation designed for particular situations or industries, such as the Dealer's Day in Court Act, 15 U.S.C. §§ 1221-25, 70 Stat. 1125-26 (1956); Miller-Tydings Act, 15 U.S.C. § 1, 50 Stat. 693 (1937); or state fair trade laws, are beyond the scope of this article.

² FED. R. CIV. P. 23.

³ The United States Supreme Court last year brought home the clear necessity of anticipating such problems in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

tributor can go directly to the courts with his private complaint as a well-armed, confident, treble-damage plaintiff. The result is that the manufacturer faces greatly escalated dangers of having made an erroneous antitrust decision concerning termination. This is particularly true of a franchisor who, with a uniformity of contract and operation, is clearly a candidate for a class action complaint. The problems involve not only the time and method of termination, but also the effect of the terms of the agreement and the course of dealing upon any potential antitrust liability.

Under ordinary circumstances a franchise agreement, like any other contract, is terminable in accordance with its terms by either party. But, like any other contract, action taken pursuant to it must not contravene the antitrust laws; for example, the action must not be part of any illegal plan or combination in violation of the Sherman Act.⁴ It is also evident that termination of a franchisee's contract for whatever reason is simply a refusal to deal with him, and thus, the manufacturer who wants to terminate a franchise should be certain that his act is not forbidden under Sections 1⁵ or 2⁶ of the Sherman Act, Section 3 of the Clayton Act⁷ or Section 5 of the Federal Trade Commission Act.⁸

Essentially, the Sherman Act forbids any contract, combination or conspiracy in unreasonable restraint of trade,⁹ and outlaws monopolization practices and any attempts to monopolize.¹⁰ On the dealership level, it may very well be a violation of the Sherman Act to attempt to monopolize distribution of a particular branded product in a given area.¹¹ Furthermore, the Federal Trade Commission Act gives the FTC the power to restrain those anti-competitive acts which may not be specifically within the purview of the Clayton or Sherman Acts.¹² In addition, the franchisor should ascertain that his agreements comply with the provisions of the Clayton Act which make it unlawful to

⁴ *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566, 575 (4th Cir. 1963); *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964). A contractual provision gives no more immunity from an antitrust violation than from any other tort. *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491 (2d Cir. 1948).

⁵ 15 U.S.C. § 1 (1964), formerly 26 Stat. 209 (1890).

⁶ 15 U.S.C. § 2 (1964), formerly 26 Stat. 209 (1890).

⁷ 15 U.S.C. § 14 (1964), formerly 38 Stat. 731 (1914).

⁸ 15 U.S.C. § 45 (1964).

⁹ 15 U.S.C. § 1 (1964), formerly 26 Stat. 209 (1890).

¹⁰ 15 U.S.C. § 2 (1964), formerly 26 Stat. 209 (1890).

¹¹ Termination is not forbidden *merely* because elimination leaves only one distributor in the area. *E. A. Weinell Constr. Co. v. Mueller Co.*, 289 F. Supp. 293, 298-99 (E.D. Ill. 1968).

¹² 15 U.S.C. § 45 (1964).

refuse to deal with a distributor on the ground that the latter is handling goods of a competitor where the effect of the arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."¹³

In 1919, in *United States v. Colgate & Co.*,¹⁴ the Supreme Court held that a unilateral refusal to deal did not violate the Sherman Act because a manufacturer had a right to choose those with whom he would trade. But the erosion of the *Colgate* doctrine was clearly evidenced forty-one years later in *United States v. Parke, Davis & Co.*,¹⁵ when the rule was severely limited and a Sherman Act violation was found in a refusal to deal with those who cut prices plus any activity by the supplier beyond mere announcement of a resale price maintenance policy.

That there is still life in the *Colgate* doctrine is one of the more oft-repeated judicial dicta. That does not mean it is practically helpful; even less does it mean that prudent businessmen should guide their conduct in reliance on it. Notwithstanding *Colgate*, the courts have experienced no difficulty in finding a combination or conspiracy which is pejoratively termed "group boycott" and declared illegal per se under Section 1 of the Sherman Act.¹⁶ Clearly a concerted refusal to deal, a horizontal agreement among entities at the same level of distribution, does amount to an illegal group boycott.¹⁷ Furthermore, such a boycott is illegal notwithstanding the size of the commercial area affected: "[I]t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."¹⁸ But there is still truth to the notion that a manufacturer can choose those whom he will have as his distributors, provided the choice is not motivated or guided by anti-competitive considerations. And it also remains true that the mere substitution of one dealer for another does not rise to the level of an antitrust violation.¹⁹ The Second Circuit expressed the rule as follows:

¹³ 15 U.S.C. § 14 (1964), formerly 38 Stat. 731 (1914).

¹⁴ 250 U.S. 300 (1919).

¹⁵ 362 U.S. 29 (1960).

¹⁶ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹⁷ *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *Fashion Originators' Guild of America, Inc., v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

¹⁸ *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

¹⁹ *Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918 (9th Cir.), cert. denied, 391 U.S. 916 (1968); *Ace Beer Distribs., Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir.), cert. denied, 375 U.S. 922 (1963); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), aff'd per curiam, 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957). "The substitution of one distributor for another changes the identity of a competitor in the

A manufacturer has the right to stop dealing with a distributor or jobber who is acting unfairly towards his product or is trying to undermine his trade

Of course, this right of a manufacturer must be exercised in good faith, and within the restrictions of the Clayton Act, and may not be exercised in such a manner so as to "substantially lessen competition" or "tend to create a monopoly" in any line of commerce.²⁰

The motivation for that "mere substitution," as well as the means the manufacturer chooses, is extremely pertinent to antitrust consequences. Although business purposes irrelevant to any antitrust problems exist, the substitution may be illegal if the real, dominant, or underlying purpose is the maintenance of resale prices, imposition of unreasonable territorial restraints, or allocation of the distributors' customers.

THE COLGATE-PARKE, DAVIS DOCTRINE AND RESELL PRICE MAINTENANCE

An agreement to maintain resale prices has long been held illegal per se under Section 1 of the Sherman Act.²¹ In addition, any agreement which fixes a price ceiling is similarly illegal.²² However, it must be emphasized that the presence of "a contract, combination or conspiracy" is essential to any holding of per se illegality under section 1. Hence, it was the determination that such a contract, combination or conspiracy did not exist that led the Supreme Court to uphold the arrangement in *Colgate*.

As the Government conceded, and as Mr. Justice Brennan wrote in *Parke, Davis*, "under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy."²³ Thus, a resale price maintenance "announcement plus refusal to deal",

field, but does not by itself eliminate competition." *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 104 (E.D.N.Y. 1968). The same rule applies when the manufacturer takes over the distribution. *B & B Oil & Chem. Co. v. Franklin Oil Corp.*, 293 F. Supp. 1313, 1317 (E.D. Mich. 1968).

²⁰ *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 247 F.2d 343, 358 (2d Cir. 1957), cert. denied, 355 U.S. 952 (1958).

²¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Implied agreements are clearly covered by the *Dr. Miles* doctrine. *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920). The notion that a patentee could set his licensee's price was based on *United States v. General Elec. Co.*, 272 U.S. 476 (1926). Although later opinions sharply attacked that rule, it was never overturned; but the Court's opinion in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), renders its validity quite dubious.

²² *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). For a criticism of the *Albrecht* holding, see *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 256-57 (1968).

²³ 362 U.S. at 37.

without any other activity, is supposed to keep the manufacturer within the bounds of antitrust legality even if he does terminate a noncomplying distributor. In *Parke, Davis*, the manufacturer threatened wholesalers with a refusal to deal "in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices." It thus "created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act."²⁴ Another court put it this way: "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."²⁵

Similar language was utilized by Judge Herlands in his recent opinion in *Interphoto Corp. v. Minolta Corp.*:²⁶

Today, a manufacturer can avail himself of the *Colgate* doctrine only where he suggests a resale price and does not make any attempts to enforce his suggestion, and he then refuses to sell to dissident distributors. Anything beyond this act of "Doric simplicity" is more than a unilateral refusal to deal and constitutes a *per se* violation of the anti-trust laws.

Which activities are so Dorically simple and which are announcement-plus is not clear from the cases or their language. But an examination of a few of the more important precedents should convince the prudent businessman that any refusal to deal with (or termination of) a distributor who has been cutting prices is extremely risky. Furthermore, the risk has now been escalated because the penalty for guessing wrong is no longer a mere injunction and a forced remarriage of manufacturer and franchisee, but includes in addition the possibility of treble-damage liability to a class composed of all franchisees.²⁷

After questioning the propriety of such an expansion of the "conspiracy" doctrine, the future Assistant Attorney General in charge of the Antitrust Division, Richard W. McLaren, argued that a simple unilateral refusal to deal with a given distributor is still governed by *Colgate* as the other side of the coin of the undoubtedly unilateral right to select dealers. "Certainly, in order to be meaningful, the seller's unilateral right to select his dealers must also include the right to continue or terminate — and to decide the conditions under which he

²⁴ *Id.* at 45.

²⁵ *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960). See *Guidry v. Continental Oil Co.*, 350 F.2d 342 (5th Cir. 1965).

²⁶ 295 F. Supp. 711, 719 (S.D.N.Y. 1969).

²⁷ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

will continue to sell — as well as the right to appoint in the first instance.”²⁸ One of the results of the recognition that a “narrow channel” does in fact remain is that summary judgment may be granted where the court can find that an illegal combination has not been sufficiently alleged.²⁹

The thinness of some of the vertical “combinations” upon which the courts have relied to impose liability is instructive in stressing the point made by Judge Madden in 1966 that *Colgate* “has in practice offered little protection to manufacturers from the finding of tacit agreements to which section 1 could apply.”³⁰ Two automobile dealer cases, *Ford Motor Co. v. Webster's Auto Sales, Inc.*,³¹ and *United States v. General Motors Corp.*,³² were somewhat predictable and have the following in common: in both, the dealers had combined to shut off a competitor or class of competitors and had enlisted the manufacturers' aid to do so. In both, the courts found that the apparently unilateral action of the manufacturers was in reality action in concert or combination with the dealers. If he is to remain within the *Colgate-Parke, Davis* doctrine, the manufacturer must stand absolutely aside from the dealers. Of course, that may not always be the most desirable position since, even in cases where protection of a trademark or quality standard is not at issue, the manufacturer may have a legitimate interest in the solvency and well-being of his distributors.

In *Webster's*, Ford sold cars, many of them current models, which had been used by Ford employees, at auctions open only to authorized dealers. The plaintiff ran a used-car lot and purchased from a friendly dealer in another town the so-called “factory Fords” at a \$50 markup. He then resold the cars at considerably lower prices than were offered by the authorized Ford dealer in his town. The authorized dealer complained to Ford's District Sales Manager in Boston, who directed the officer in charge of the auctions to “correct the situation.” Accordingly,

²⁸ McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTITRUST BULL. 161, 165 (1968). McLaren went on to suggest a safer path—the unenforced suggested resale price program. The danger in that course, unfortunately, is that the supplier runs the risk of FTC action for false advertising or fictitious pricing if the suggested price is cut by too many dealers.

²⁹ *Carbon Steel Prods. Corp. v. Allen Wood Steel Co.*, 289 F. Supp. 584 (S.D.N.Y. 1968) (refusal to deal could not be said to be caused solely by wholesaler's handling of similar imported steel).

³⁰ *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 879 (1st Cir. 1966). See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); FTC Advisory Opinion Digest No. 163, 3 CCH TRADE REG. REP. ¶ 18,174 (1968).

³¹ 361 F.2d 874 (1st Cir. 1966).

³² 384 U.S. 127 (1966).

the next bid invitation for "factory Fords" contained a clause "asking" the dealers not to bid for the purpose of reselling the cars to a wholesaler. Of course, Ford maintained that the insertion of the clause was a unilateral action on its part. But the Court of Appeals for the First Circuit affirmed a jury verdict for the used-car dealer, and Ford appealed. From the circumstances, Judge Madden held that the jury could have found an agreement between Ford and the complaining dealers. He stressed that such an agreement went beyond the mere vertical territorial allocation which had been questioned but not held per se illegal in *White Motor Co. v. United States*.³³ The objects of the restriction were the elimination of one class of competitor to the authorized Ford dealers and the further elimination of price competition in one community. As such, it constituted a group boycott and was unlawful per se.

At about the same time, the Supreme Court decided the *General Motors* case. General Motors Corp. (hereinafter GM) had franchised dealers to sell cars at a specific site, including in the agreement a so-called "Location Clause", by which the dealer was forbidden to move or to sell at any other site without the consent of GM. A few authorized Chevrolet dealers in the Los Angeles area entered into agreements with certain discount houses, under which the discounters would refer customers to the dealer, who would then sell at below list prices and give a "cut" to the discount house.³⁴ Sometimes the discount house was as much as forty miles away from the dealer, the advantage being that it served as a central selling place for the dealer and apparently was able to attract otherwise unreachable customers and those who thought that dealing with the discount house resulted in bargain prices. By 1960, discount-house referrals in the Los Angeles area resulted in over 2,000 sales, and the dealers' association thus brought the problem to GM's attention, impressing the company with the seriousness of the problem by "flooding" it with telegrams and letters of complaint. GM representatives then determined, again apparently unilaterally, that the practice was, in fact, a violation of the "Location Clause". The company's corrective action consisted of a visit to each dealer, at which time it was stressed that such practices were inimical to the proper "business-like" selling of Chevrolets and thus constituted a violation of the agreement; furthermore, it was pointed out that each of the other dealers was being contacted. But no attempt was made to "cut-off" any dealer. However,

³³ 372 U.S. 253 (1963).

³⁴ The agreement provided for one or more of several ways of accomplishing the referral, by the most usual of which the customer would be told to go to the dealer's place of business where he could buy a Chevrolet at lower than list price, the discount house receiving a stipulated fee for each sale.

the original GM plan to police the arrangement unilaterally "was displaced . . . in favor of a joint effort between General Motors, the three appellee associations, and a number of individual dealers."³⁵

Mr. Justice Fortas found it unnecessary to deal with the legality of the "Location Clause" but had little difficulty in terming GM's activities a "classic case" of joint action to boycott: "Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act."³⁶ An explicit agreement is not necessary, especially under circumstances wherein the parties are and have been dealing together for a long period of time. The competitive restriction was not vertical, but horizontal, the manufacturer acting with most of the dealers to eliminate one form of competition on the level of those selling to the ultimate consumer. The handle used to strike down the operation was the finding, essential to a section 1 violation, that the dealers had conspired *inter se* and with the manufacturer, but it was a handle rendered substantial by the methods utilized by the dealers to bring the problem to GM's attention and by the joint enforcement operation.

However, none of the precedents have gone as far in alleging and finding a conspiracy as have a series of recent newspaper cases. A publisher is interested in the widest circulation possible in his home city so that his advertising, the main source of his revenue, will yield the highest rate of profit possible; therefore, he wants to keep down the price of the newspaper to the reader. The dealer, on the other hand, has the more common supply-demand problem of achieving the maximum volume at the maximum price. To meet rising labor costs, in particular, the dealers have begun to charge a "service fee" which most, but perhaps not all, subscribers will pay. Publishers, in their desire for maximum volume, have fought against the imposition of that "service fee" by the home delivery agency.

Newspaper distribution provides, however, only an extreme example of a fairly general conflict. Usually, the greater the markup exacted by the dealer, the lower the volume, and normally the profits, of the manufacturer whose income from any one item is not affected by price-cutting at the retail level. However, the manufacturer may

³⁵ 384 U.S. at 136.

³⁶ *Id.* at 145. A similar attempt to boycott discount houses arose in a more clearly horizontal situation, which provided precedent for Justice Fortas' conclusion. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). *Klor's* and *GM* hold that vertical territorial or customer restrictions are illegal "where the purpose [is] to prevent the distribution of automobiles to or by 'discounters'" *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).

desire to keep prices up even at the expense of reduced volume over the short-term, in order to protect his distributors' financial condition, induce them to perform post-sale services, maintain the "image" of the product as a "quality" item, make certain it is not being downgraded as a "loss leader", etc.

In *Graham v. Triangle Publications, Inc.*,³⁷ the question posed was whether the publisher could cut off a dealer who imposed such a "service fee." At the time the defendant raised the price of its paper, it informed its dealers that it would not supply the paper to any dealer who charged the fee. The only policing undertaken by the publisher was the monitoring of complaints from subscribers, and he seems to have attempted to stay within the limits of the *Colgate-Parke, Davis* doctrine. The dealers consequently formed an association whose main purpose was to discuss service fees and raise a litigation fund to support the first dealer who was cut off. The plaintiff turned out to be that first dealer.

Judge Higginbotham had little difficulty in denying the preliminary injunction sought by the plaintiff.³⁸ The denial was based on the proposition that it was unlikely that the plaintiff would be successful in substantiating his claim. The court could not find any conspiracy, since it was clear that the publisher had acted unilaterally,³⁹ and it relied on a decision of the Court of Appeals for the Third Circuit in *Klein v. American Luggage Works, Inc.*,⁴⁰ which held that advice to all dealers not to cut prices, followed by a dealership termination, did not violate section 1, even if there was arguably "conscious parallelism" among the dealers. Of course, after *General Motors, Klein* became highly suspect as good authority, since the Third Circuit's requirement in *Klein* of "some consciousness of commitment to a common scheme"⁴¹ seems to have been virtually eliminated by the later cases.

Then, in *Albrecht v. Herald Co.*,⁴² the Supreme Court over-

³⁷ 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965).

³⁸ Had the court thought liability likely to have been shown, the dealer would have been entitled to a preliminary injunction enjoining the publisher to continue to deal with him. *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969); *Kay Instrument Sales Co. v. Haldex Aktiebolag*, 5 CCH TRADE REG. REP. ¶ 72,488 (S.D.N.Y. June 11, 1968); *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964).

³⁹ Further, he could not find any analogy to minimum resale price maintenance cases because here the publisher was benefiting the consumer by keeping prices down. *But see Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

⁴⁰ 323 F.2d 787 (3d Cir. 1963).

⁴¹ *Id.* at 791, *quoting* *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963).

⁴² 390 U.S. 145 (1968).

turned an affirmed jury verdict in a case quite similar to *Graham*. The defendant set a suggested retail price for its newspaper which was distributed by independent carriers operating in exclusive territories. The exclusivity provision was subject to termination if the suggested price was exceeded. After the plaintiff raised the retail price, the publisher sent a notice to the plaintiff's subscribers that it would take over delivery to any who were unwilling to pay the higher price, in effect eliminating the exclusive-territory provision. The defendant hired one Milne to call on the subscribers and inform them that the publisher would arrange for other delivery service. About three hundred of the plaintiff's customers (approximately a quarter) chose to switch, and the publisher hired one Kroner to service them.

In the Supreme Court opinion, Mr. Justice White repeated the *Parke, Davis* interpretation of *Colgate*, that an illegal combination exists when the seller suggests the resale price and secures that price by means beyond a mere announcement and refusal to deal. He found such means—a combination or conspiracy of the publisher, Milne and Kroner—withstanding the undisputed evidence that Milne and Kroner were simply employees performing ministerial tasks which could just as easily have been performed by the publisher.⁴³ Mr. Justice White wrote:

If a combination arose when *Parke Davis* threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail prices.⁴⁴

That statement would seem to be a serious misinterpretation of *Parke, Davis*. The *Parke, Davis* conspiracy was a horizontal dealer combination, abetted by the manufacturer; the *Albrecht* "conspiracy" evaporates upon analysis into activities controlled by and the work of one economic entity, which may be undesirable but which is not concerted action within the meaning of section 1. This is not to say that such a combination should not be inferred in a proper case; but in *Albrecht*, all the facts pointed to exactly the opposite conclusion and resulted in two anomalies—the "conspiracy" of dealers getting their way and the Sherman Act being used to raise prices to the consumer.

What Mr. Justice White intended by his extension of the con-

⁴³ Clearly the independence and separateness of Milne and Kroner were not nearly as great as that of Holt and Bartell in *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962).

⁴⁴ 390 U.S. at 149.

spiracy doctrine may be apparent from his suggestion that it may no longer be necessary to find some handle, like Milne or Kroner, from which to hang a finding of conspiracy:

Petitioner's original complaint broadly asserted an illegal combination under § 1 of the Sherman Act. Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it.⁴⁵ . . . These additional claims, however, appear to have been abandoned by petitioner when he amended his complaint in the trial court.

Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention.⁴⁶

In finding such a conspiracy or combination, the Court changed the rules regarding the "refusal to deal" by the publisher and brought him within the ambit of per se illegality. That is a somewhat significant change to have turn upon the "fact" finding that there was a conspiracy.⁴⁷

Some of the various permutations of conspiracy available to the imaginative plaintiff were spelled out in an opinion by Judge Pettine, in *Stanton v. Texaco, Inc.*,⁴⁸ which arose on a motion to dismiss a very generally worded complaint:

Suffice it to say that the facts alleged in the instant case make out one or more of the following combinations: (1) a combination between the defendant and its dealers to fix prices on the retail level, *Albrecht v. Herald Co.*, at 150 & n.6, 88 S. Ct. 869; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967); (2) a combination between the defendant and the plaintiff, *Albrecht v. Herald Co.*, 390 U.S. at p. 150 & n.6, 88 S. Ct. 869; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed.

⁴⁵ *Id.* at 150 n.6, citing *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).

⁴⁶ *Id.*, citing *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196 (9th Cir. 1963); *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965).

⁴⁷ An appropriate observation at this point is the lack of any reluctance by the Supreme Court in this and other cases to find a conspiracy which was not found by the lower courts. Of course, all of the "facts" were in the record and "conspiracy" may be "the legal standard required to be applied"—or nothing but a kind lip-service to precedents otherwise discarded. *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

⁴⁸ 289 F. Supp. 884 (D.R.I. 1968).

2d 98 (1964); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 n.16, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968); (Judge McEntee's opinion in *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967) is distinguishable because there is here both a consignment agreement and prior acquiescence to the defendant's price dictates.) (3) a combination between the defendant and the plaintiff's customers, *Albrecht v. Herald Co.*, 390 U.S. at p. 150 & n.6, 88 S. Ct. 869. This court is, therefore, prepared to go to trial on the question of combination or conspiracy.⁴⁹

One circuit has relied on *Albrecht* and *Perma Life Mufflers, Inc. v. International Parts Corp.*,⁵⁰ to find a conspiracy between a manufacturer and reseller. In *Sahm v. V-1 Oil Co.*,⁵¹ the plaintiff leased a retail gasoline service station from the defendant for a term of one year; the lease was renewable, with each party able to terminate on thirty-day notice. Simultaneously, the parties orally agreed that the defendant would consign gasoline to the plaintiff to be resold at prices set by the defendant. Thereafter, the dealer raised the price and was cut off. He sued alleging a section 1 violation and characterizing "the agreement and acts of defendant as a collusive price-setting scheme."⁵² The Court of Appeals for the Tenth Circuit reversed a dismissal of the complaint. The conspiracy, it held, could be based on a combination between manufacturer and dealer "even though the conduct . . . which caused the petitioner's injury occurred after the petitioner had reneged on his agreement to follow respondent's advertised price."⁵³ The court relied on the proposition that there could be a conspiracy between the lessor and the alleged victim.⁵⁴

Mr. Justice White's opinion in *Albrecht* is disturbing for its lack of business reality.⁵⁵ The net effect of the expansion of the conspiracy doctrine is to render illegal per se those refusals to deal which are caused by the dealer's unwillingness to accept the resale price suggestions of the supplier. But the discussion in the opinions has centered on the requirements of a conspiracy, one court competing against another in discerning a conspiracy where anyone who did not know the

⁴⁹ *Id.* at 891.

⁵⁰ 392 U.S. 134 (1968).

⁵¹ 402 F.2d 69 (10th Cir. 1968).

⁵² *Id.* at 70.

⁵³ *Id.* at 72, citing *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968).

⁵⁴ *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), as cited by Mr. Justice Black in the *Perma Life* decision.

⁵⁵ Note also the problem of the noncombining conspiracy discussed by Professor Handler in his annual lecture before the Association of the Bar of the City of New York. Handler, *Through the Antitrust Looking Glass*, 23 RECORD OF N.Y.C.B.A. 601 (1968).

paths of a labyrinthine law would see only unilateral action. It would seem more appropriate to discuss the effect on competition of particular terminations of franchises and the reasons therefor — in terms other than conclusory fiats.

On the latter point, as FTC Commissioner Philip Elman wrote, the courts seem to be substituting for realistic economic analysis an old curmudgeon of English property law, that a seller has lost all control of his property after it leaves his hands.⁵⁶ The necessary across-the-board application of that black-and-white proposition to today's diverse business practices may appear somewhat facile and anachronistic, although Mr. Justice Fortas seems to have embraced it in *United States v. Arnold, Schwinn & Co.*:⁵⁷ "If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."⁵⁸ Rather it would seem far more desirable to consider whether all parties — manufacturer, franchisee, consumer — are most benefited by allowing some independence to the retailer while reserving some control over retailing in the manufacturer who has often expended considerable effort and money in nationwide promotion and advertising. The alternative may well be to place all control in the hands of the manufacturer whose name, goodwill and consumer acceptance is at stake and do away with the small businessman-distributor completely — certainly undesirable from an antitrust viewpoint.

A major post-*Perma Life-Albrecht* holding in this area is *Interphoto Corp. v. Minolta Corp.*⁵⁹ The plaintiff alleged a conspiracy between the manufacturer and other dealers to allocate territories and maintain resale prices. By the terms of the dealership contract, the plaintiff was prohibited from selling Minolta products in thirteen states. Minolta circulated a suggested resale price list. It had made objections at various times when wholesalers or retailers failed to honor territorial restrictions or adhere to the suggested prices. Minolta wrote the plaintiff objecting to deviations from the sales agreement "indicating to dealers that they can bargain for better prices" with Interphoto, and seeking an "end to this type of reckless selling methods." Minolta requested reports from sales representatives concerning Interphoto sales

⁵⁶ Elman, "Petrified Opinions" and Competitive Realities, 66 COLUM. L. REV. 625, 633 (1966), as cited by Mr. Justice Stewart in his dissent in *Albrecht v. Herald Co.*, 390 U.S. 145, 168 (1968) (dissenting opinion).

⁵⁷ 388 U.S. 365 (1967).

⁵⁸ *Id.* at 379.

⁵⁹ 295 F. Supp. 711 (S.D.N.Y. 1969).

in forbidden regions, and thereafter notified Interphoto of cancellation pursuant to the agreement.

The first point made by Judge Herlands, in considering whether any conspiracy existed, was, characteristically, that "stabilization of prices has never been a permissible objective under the Sherman Act, and is merely a euphemism for manipulative price-fixing."⁶⁰ Although stating that "mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting and selective discounting are not enough to imply a combination in violation of § 1, [since they] arise in the normal course of business,"⁶¹ Judge Herlands found the required conspiracy by concluding that Minolta's practices should not be condoned.⁶²

Where was the alleged conspiracy, and between whom? In some cases the manufacturer "polices" the dealers out of a silent agreement that benefits the dealers and amounts to a conspiracy among them. But the opinion did not offer any support for that conclusion: "Where, however, the manufacturer takes action and relays these complaints to the dealers with accompanying words of 'advice,' a combination to maintain resale prices can be implied. Minolta has gone even further by employing its sales representatives to police the market."⁶³ There may have been a conspiracy, clearly agreed to or implied, oral or written; on the other hand, Minolta may have "policed" the dealers out of its own motives and perhaps even against the wishes of many of the dealers. In Judge Herlands' view, a manufacturer's resale price maintenance policy, if policed at all, is a per se combination with other dealers, whether or not those other dealers are aware of it and regardless of whatever other motives the manufacturer may have had.

Another major inroad upon the Sherman Act conspiracy requirement has been the increased use of intra-enterprise conspiracy to satisfy that requirement. Thus, the franchisor, operating under several brand names or through separate corporations, may find that he is "conspiring" with himself. Until a couple of years ago, *Timken Roller Bearing Co. v. United States*,⁶⁴ and *Kiefer-Stewart Co. v.*

⁶⁰ *Id.* at 718.

⁶¹ *Id.* at 719 n.3.

⁶² "The facts of record before this Court—disclosed by Minolta's own communications and in no way denied—persuasively establish the existence of unlawful resale price maintenance. The blatant and crude techniques utilized by Minolta in its attempt to coerce Interphoto into adherence to the suggested price list do not bear reiteration." *Id.* at 719.

⁶³ *Id.* at 719 n.3. The sales representatives, as far as the opinion tells us, may have been employees.

⁶⁴ 341 U.S. 593 (1951).

Joseph E. Seagram & Sons, Inc.,⁶⁵ marked the outer limits of the intra-enterprise conspiracy doctrine, and they had more often than not been regarded as aberrations.⁶⁶ The general rule has been stated in this manner:

Concerted action by persons within a single business enterprise is not a "contract, combination, . . . or conspiracy" within the meaning of § 1. . . . All concerted action by two natural persons could be a "combination," but this reading would be socially inconvenient and historically surprising. So long as the business enterprise is regarded as an individual economic unit, it must be permitted to act. To say that a single corporation acting unilaterally cannot "combine" with itself is necessarily to say that it cannot "combine" with its officers or employees who are its only means for acting. And so it is held.⁶⁷

But just prior to *Albrecht*, the District Court for the District of Hawaii, in *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*,⁶⁸ reaffirmed the *Kiefer-Stewart* doctrine, holding that the marketing by one business entity of ostensibly competing brands of liquors could give rise to the finding of a combination illegal under the Sherman Act.⁶⁹ However, unlike *Kiefer-Stewart* which involved subsidiary corporations, *Hawaiian Oke* was concerned solely with divisions of the same corporation. The court concluded that:

Having made the divisions separate and independent for this particular economic function [sales], defendant cannot now escape the legal impact of its action. The court finds that Four Roses, Frankfort and Calvert are each distinct and separate, operating, mar-

⁶⁵ 340 U.S. 211 (1951).

⁶⁶ See also *Distillers Corp.-Seagram's Ltd.*, 50 F.T.C. 738 (1954). *Timken* in particular was regarded as weak support because ownership was not completely common and the lower court had found separate control. 83 F. Supp. 284, 311-12 (N.D. Ohio 1949). See also Attorney General, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY ANTITRUST LAWS at 36 (1955); H. BLAKE & R. PITOFKY, ANTITRUST LAW 436 (1967). See also *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

⁶⁷ P. AREEDA, ANTITRUST ANALYSIS, 236-37 (1967). In *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), the court held "absurd" the notion of an intra-enterprise conspiracy. "A corporation cannot conspire with its officers or agents to violate the antitrust laws." *Chapman v. Rudd Paint & Varnish Co.*, 5 CCH TRADE REG. REP. ¶ 72,745 at 86,668 n.9 (9th Cir. Mar. 20, 1969).

⁶⁸ 272 F. Supp. 915 (D. Hawaii 1967).

⁶⁹ The court did not have before it and thus left open the even more difficult case of double branding by a corporation where all brands are handled by the same division and by the same manufacturing and sales personnel. Whether every whiskey drinker knows of Seagram's common ownership, it is not likely that the distributors have any false ideas. "There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered or dealt with the three entities as independent organizations." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962). See *Deterjet Corp. v. United Aircraft Corp.*, 211 F. Supp. 348 (D. Del. 1962).

keting entities, legally and factually capable of entering into the conspiracy alleged.⁷⁰

*Perma Life Mufflers, Inc. v. International Parts Corp.*⁷¹ went even further in finding a conspiracy. Several dealers franchised by Midas, Inc., brought a treble-damage action against Midas, its parent, International Parts, two other International subsidiaries and six individual officers or agents. The plaintiffs alleged that the defendants had conspired to enforce a franchise agreement which was in violation of the Sherman and Clayton Acts. The franchise agreement obligated the dealer to purchase all of its mufflers from Midas, to honor the guaranty on mufflers sold by any Midas dealer, to sell the mufflers at certain retail prices, and to sell only at specified locations. The dealership was exclusive within a defined territory and permitted the use of registered trademarks owned by Midas.

The lower courts entered and affirmed summary judgment for the defendants on the ground, *inter alia*, that all of the defendants comprised a single business entity and were therefore incapable of conspiring.⁷² The Supreme Court, in an opinion by Mr. Justice Black, reversed: "But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."⁷³ That was so although the related companies were part of a family corporation wholly owned by a father and son. In *Kiefer-Stewart*, one of the major factors in the Court's analysis was the presence of an alleged competition between the two members of the corporate family, *i.e.*, they held themselves out as competitors. In *Hawaiian Oke*, the court stressed the ostensible interbrand competition.⁷⁴ In *Perma Life*, the plaintiffs did assert in their briefs, without supporting affidavits, that International sold a competing line of mufflers under the "International" name.⁷⁵ But Mr. Justice Black did not refer to that and, of course, there was no proof.

⁷⁰ 272 F. Supp. at 924.

⁷¹ 392 U.S. 134 (1968).

⁷² 376 F.2d 692 (7th Cir. 1967).

⁷³ 392 U.S. at 141-42.

⁷⁴ Except for *Hawaiian Oke*, there has not been any case where two divisions of the same corporation have been held as conspirators. *Alpha Distrib. Co. v. Jack Daniel's Distillery, Lem Motlow Prop., Inc.*, 207 F. Supp. 136 (N.D. Cal. 1961), *aff'd per curiam*, 304 F.2d 451 (9th Cir. 1962). To have section 1 liability turn on whether a corporation chooses, for reasons of tax, convenience or otherwise, to operate through divisions or subsidiaries seems too formal.

⁷⁵ Brief for Petitioner at 38, Law Reprints, Trade Reg. Series, Vol. 1, No. 9 (1968).

Although the courts primarily focus attention on the existence of a conspiracy, the recent cases are but an extension of *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*⁷⁶ and *Parke, Davis* into *Colgate* territory. The language of Justices Black and White and of the *Hawaiian Oke* court regarding the elements of a conspiracy, it would seem, cannot be applied to a mere collaborative price-fixing charge, and must be limited to resale price maintenance cases. These decisions, then, are best analyzed as determinations of the legality of resale price maintenance schemes. Clearly, prudence dictates that, at least temporarily, the franchisor cannot rely on the *Colgate* doctrine. It does appear that the Court is formulating a new set of rules regarding refusals to deal, and if that is what *Albrecht* and *Perma Life* mean when combined, then, indeed, the law has taken a major step.

When the retailer sells his car to the consumer, the expectation is quite clear that the retailer has no further property rights to the car, in the absence of some financing arrangement. There are some manufacturers who cause title to pass as soon as the goods enter the channels of distribution. There are others who hire employees to sell their products directly to the ultimate consumer, and also those who employ agents and distributors in a wide variety of arrangements to get the product into the hands of the ultimate consumer. "Mom-and-pop" stores have a considerable history in American retail operations. Even in these days of efficient marketing giants and national advertising, certain imagination and initiative at the retail level is said to be encouraged when the retailer owns his own business. But the "mom-and-pop" store has not been able to compete on its own against the large chain or discount house without financial backing, certainty of supply, technical training when required, and the lure of a nationally advertised product name.⁷⁷ The consumer, in this era of mass media, is shopping by brand name, and not so much by his respect for and reliance on the individual retail trader. It is in response to this recent development that the franchisee has arisen, tied in many cases very closely to the manufacturer's apron strings, but operating for his own profit and apparently effectively competing against the discount house and the chain outlet.

The automobile cases⁷⁸ do not present a problem for the economic rationale underlying the franchise agreement, primarily because a con-

⁷⁶ 220 U.S. 373 (1911).

⁷⁷ See Jones, *The Growth and Importance of Franchising and the Role of Law*, 12 ANTITRUST BULL. 717, 719 (1967).

⁷⁸ *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966).

spiracy to eliminate intrabrand competition among the dealers or to put one type of reseller out of business has little or no economic justification, and is, in reality, a "classic case" of Sherman Act illegality. And in those cases there was ample evidence that the dealers themselves had combined.⁷⁹ Merely because the conspirators were franchisees or dealers does not render their combination immune from section 1 illegality since the pernicious effects of concerted action to control intrabrand prices are just as clear as those involving interbrand activity. In the newspaper cases,⁸⁰ it is the combination which might prove to be the winner—which certainly seems a novelty in American anti-trust practice. Of course, it may be said that the Herald Company could terminate all of its distributors and deliver the newspaper itself. But that may well result in violations of other social and moral goals and in greater concentration of economic power; and furthermore, violations of Section 7 of the Clayton Act⁸¹ may occur if acquisition is the method used.

One thread running through the cases, from *GM* to *Albrecht* to *Perma Life*, is the insistence of the Supreme Court upon some protections for the "middleman" in business as a device by which to atomize centers of control of economic power.⁸² The *Albrecht* rationale may not even be economic at all; it stems from a social concern that the "middleman" should not be squeezed by too tight a margin directed by the economic considerations of the publisher.⁸³ Analyzing *Albrecht* from the point of view of the economist, to provide the most goods and services at the lowest price, the decision appears to be a step backwards;⁸⁴ and analyzing the case from the legal point of view

⁷⁹ A disturbing part of the *Interphoto* opinion is the lack of any specific reference to such a combination being in effect, or being inferred from the facts before the court.

⁸⁰ *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

⁸¹ 15 U.S.C. § 18 (1964), formerly 38 Stat. 731 (1914).

⁸² Protection of the independence of the small economic decision maker is rooted deeply in American political and legal thinking and is not restricted to a few Populists of olden days. A. D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA*, 28-30 (1962); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956). One exposition of the need for such protection is in Justice Peckham's opinion in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897):

In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.

⁸³ 390 U.S. at 153.

⁸⁴ This is especially true because the publisher has no foreseeable motive in raising

of a conspiracy to set prices, the holding "stands the Sherman Act on its head."⁸⁵ But, if *Albrecht*, *Perma Life* and *GM* are viewed as applying the goal of diffusing control of the nation's economic resources, the Court ought to state that rationale explicitly and meet directly the argument that in *Albrecht*, and perhaps in *Perma Life*, it gave too much weight to such social considerations, to the exclusion of only slightly less important economic considerations. For competition is both an economic and a social phenomenon, and to analyze a fact pattern in terms of feudal rights or unintentional conspiracies is to avert reality. An accommodation must be drawn, and drawn explicitly, between such considerations and the not fully consistent considerations of encouraging, at least selectively, the larger manufacturers to employ and support dealers not fully independent, but as independent as is economically feasible.

REFUSALS TO DEAL WITH DISTRIBUTORS WHO ALSO SELL COMPETING LINES

Franchisors may refuse to deal further with a distributor for a variety of other reasons which can be troublesome from an antitrust viewpoint. Among the more common is the refusal to sell to a franchisee who also distributes a competing line.

It often seems reasonable, even necessary, to the franchisor not to permit his dealers to handle competing lines of goods in order to protect quality standards, maintain adequate service, insure that the franchisor's product is not put in a secondary position, etc. But this understandable desire of a manufacturer, *i.e.*, that his distributors not help the competition, may very well run afoul of the antitrust laws. Where such an exclusive dealing or requirements clause is necessary to protect uniformity, and that uniformity is essential to the product or service rendered, the courts have indicated a willingness to balance the interests of the manufacturer in protecting his goodwill and trademarks against the interests of the dealer in doing business with those companies of his untrammelled choice.

In *Susser v. Carvel Corp.*,⁸⁶ Carvel maintained through independent franchised businessmen a chain of four hundred stores which primarily sold soft ice cream products. The stores were uniform in appearance and in operation; each was governed by a detailed Standard Operating Procedure Manual, which gave instructions for types of

newspaper prices unfairly even if he does succeed in putting out of business all but a few "specially advantaged dealers."

⁸⁵ 390 U.S. at 170 (dissenting opinion).

⁸⁶ 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

products to be sold, recipes, nature of advertisements, color of uniforms and hours of operation. The appearance of the stores was protected by a design patent; and the ice cream was dispensed from a patented machine. The Carvel trademark was prominently featured in the store, on the machine and on all equipment.

After finding that there had been no resale price maintenance since 1955, the court considered those provisions whereby the dealer was obligated to refrain from selling any non-Carvel product and to purchase from Carvel, or a Carvel-approved source, his requirements for the ice cream mix and certain other products. Reasoning that *Tampa Electric Co. v. Nashville Coal Co.*⁸⁷ made it clear that *Standard Oil Co. v. United States*⁸⁸ did not apply a per se rule to exclusive dealing or requirements contracts, the court found that the plaintiff had proven neither anti-competitive effects nor unreasonable restrictions and, more importantly, that Carvel had demonstrated a valid economic justification for the arrangement. With regard to the latter point, the court held that "the fundamental device" of Carvel's market acceptance was the use of the trademark which signified to the transient consumer products of a uniform quality and nature: "Trademark licensing agreements requiring the sole use of the trademarked item have withstood attack under the antitrust laws where deemed reasonably necessary to protect the goodwill interest of the trademark owner."⁸⁹ With respect to agreements not to buy cones or paper products except from those sellers selected by Carvel, the court found no illegality, because Carvel was not in competition with them.⁹⁰ Thus, the court concluded that Carvel was justified in terminating the distributorships of those plaintiffs who refused to live up to the agreement.

The presence of the economic justification of the Carvel arrangement and the necessity that a trademark owner maintain the quality standard of his licensed mark⁹¹ will occur more often in connection with franchises than with other distribution methods. Franchises serve as a fairly common means of widely distributing a nationally advertised service built around a basic product. But to avoid antitrust

⁸⁷ 365 U.S. 320 (1961).

⁸⁸ 337 U.S. 293 (1949).

⁸⁹ 332 F.2d at 517. See also *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403 (5th Cir. 1962); *Bascom Launder Corp. v. Telecoin Corp.*, 204 F.2d 331 (2d Cir. 1953); *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935).

⁹⁰ But that restriction may be for the benefit of the other manufacturer in dealing with his competition and thus illegal as a restraint on competition in that market.

⁹¹ See Comment, *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963).

liability, there must be economic justification for the restrictions; in other words, it is necessary that there be more than a mere desire to control the dealers.⁹² Because those considerations of quality and uniformity are inapplicable to patent cases, the courts have held that it is "patent" misuse to forbid a licensee to deal in competing goods.⁹³

In *United States v. J. I. Case Co.*,⁹⁴ it was alleged that the manufacturer had made it clear to the dealers that they were not to handle competing goods and had refused to renew agreements with those dealers who did not cooperate. But Chief Judge Nordbye held that such action did not violate the antitrust laws:

A farm machinery manufacturer must have independent discretion as to any person or concern which it will designate as a dealer. If a dealer is handling competitive lines to the detriment of Case, for instance, sound business permits it to withdraw and look for another dealer. The suggestion was made in argument by plaintiff's counsel that a dealer has the inherent right to handle as many lines as he desires regardless of the consequences to him business-wise. Granted, but he has no right to require the manufacturer to fail with him. Surely, where a dealer is so wedded to a competitive line that Case is a mere stepchild in the dealer's family, there can be no restriction upon the right of Case to look for another business home in the community.⁹⁵

Perhaps this is so; however, the "stepchild" is a far cry from the only-son requirement! The court found for the defendant on the grounds that coercion had not been shown and that the "quantitative substantiality" test of *Standard Oil*⁹⁶ had not been satisfied. In *Standard Oil*, exclusive-supply contracts had been struck down as violative of Section 3 of the Clayton Act because the Government had shown that competition had been foreclosed to a substantial portion of those engaged in the affected line of commerce. In *Carter Carburetor Corp. v. FTC*⁹⁷ however, the Eighth Circuit struck down oral agreements not to sell competing lines,⁹⁸ holding that threats to re-

⁹² Compare *Carter Carburetor Corp. v. FTC*, 112 F.2d 722 (8th Cir. 1940), with *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951). One clear case of inapplicability of the *Carvel* doctrine is the multi-product general store.

⁹³ *McCullough v. Kammerer Corp.*, 166 F.2d 759 (9th Cir.), cert. denied, 335 U.S. 813 (1948); *National Lockwasher Co. v. George K. Garrett Co.*, 137 F.2d 255 (3d Cir. 1943); *Columbus Automotive Corp. v. Oldberg Mfg. Co.*, 264 F. Supp. 779 (D. Colo. 1967), aff'd per curiam, 387 F.2d 643 (10th Cir. 1968).

⁹⁴ 101 F. Supp. 856 (D. Minn. 1951).

⁹⁵ *Id.* at 863.

⁹⁶ 337 U.S. 293 (1949).

⁹⁷ 112 F.2d 722 (8th Cir. 1940).

⁹⁸ "[I]t is immaterial that those who handled petitioner's products were not obliged to affirmatively promise in express terms not to handle goods of Carter's competitors." 112 F.2d at 732.

fuse to deal with those franchisees who handled a competitor's goods constituted an "unfair method of competition" within the meaning of Section 5 of the Federal Trade Commission Act.⁹⁹ Hence, as *Carter Carburetor* and *Standard Oil* make clear, any restriction upon handling competing goods will be tested by the amount of commerce affected and the economic justification for its implementation.

TERMINATIONS OF FRANCHISEES WHO LITIGATE

When the franchisee threatens to bring a lawsuit against his franchisor to vindicate alleged antitrust rights and secure an injunction against operation of certain provisions of the dealership agreement, there is a natural temptation on the part of the franchisor to terminate the relationship. He would, however, do well to think twice about any such step.

The first case of importance in this regard is *House of Materials, Inc. v. Simplicity Pattern Co.*,¹⁰⁰ wherein the district court held that Simplicity had violated the antitrust laws by terminating contracts of dealers who had brought suit against the company, reasoning that the sole motive for termination was "exertion of economic pressure to deter plaintiffs from pursuing their legal rights and remedies."¹⁰¹ The Court of Appeals for the Second Circuit reversed since there was no specific provision in the antitrust laws which seemed to cover the situation. The court explicitly held that the refusal to deal was not an attempt to achieve a monopoly in violation of Section 2 of the Sherman Act, and was not part of any resale price maintenance scheme.

However, seven months later in *Bergen Drug Co. v. Parke, Davis & Co.*,¹⁰² the Court of Appeals for the Third Circuit apparently took the reverse position. Bergen, a wholesaler of pharmaceuticals and drugs, sued Parke Davis, alleging discriminatory dealing, mono-

⁹⁹ In many respects agreements by the franchisee not to handle competing goods are much like requirements contracts which, if reasonable, have been upheld. In *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Court reaffirmed its position that requirements contracts are not illegal per se and permitted a twenty-year contract for supply of all coal needed to stand. But *Tampa Electric* should not be relied on where many requirements contracts are involved; in short, in the area of franchises. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922). See *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142 (3d Cir. 1936).

¹⁰⁰ 298 F.2d 867 (2d Cir. 1962), *aff'g* P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961).

¹⁰¹ P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 59 (S.D.N.Y. 1961), *aff'd sub nom.*, *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962).

¹⁰² 307 F.2d 725 (3d Cir. 1962).

polization and an attempt to monopolize. Shortly thereafter, Parke Davis wrote Bergen permanently closing the account. Bergen moved for an injunction *pendente lite* to restrain Parke Davis from the termination on the ground that it would force Bergen out of the drug business since Parke Davis supplied a major portion of its needs and because twenty-five percent of the prescriptions it filled specified Parke Davis products.

The court reversed a denial of the injunction, finding that the refusal to deal would further the monopoly alleged by Bergen. The court relied on an earlier precedent¹⁰³ which declared "that the court possessed equity powers to compel the parties to continue their relationship pending disposition of the main claim."¹⁰⁴ Selling to an unwanted distributor was not viewed as "oppressive," especially in view of the impersonal relationship that had existed between the parties. Noting that many of the products supplied by Parke Davis were "indispensable" to the operation of a retail pharmacy, Judge Staley concluded that "a court can [certainly] act where a party's conduct is calculated to frustrate litigation."¹⁰⁵

Relying on *Bergen Drug*, a district court recently granted a preliminary injunction against termination of a litigating distributor. The court held that the plaintiff had made "a sufficient showing of probable success" that defendant's agreement contained a resale territorial restriction in violation of Section 1 of the Sherman Act.¹⁰⁶ The suit, to enjoin further operation of the restrictive portion of the agreement, had precipitated a notice from the defendant terminating the distributorship. "There is nothing intrinsically wrong" with cancellation on short notice, but "the use of a short term cancellation provision for the purpose of violating the law is itself a violation of the anti-trust law."¹⁰⁷

Thus, a franchisor cannot be assured that the bringing of litigation by the franchisee is always a justifiable excuse for refusing to deal with that franchisee; in fact, the start of litigation may seriously hamper the franchisor's freedom of action to terminate.

¹⁰³ *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962), under the "Dealers Day in Court Act," 15 U.S.C. §§ 1221-25, 70 Stat. 1125-26 (1956).

¹⁰⁴ 307 F.2d at 726.

¹⁰⁵ *Id.* at 728, citing *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941), cert. denied, 315 U.S. 813 (1942).

¹⁰⁶ *Chapiewsky v. G. Heileman Brewing Co.*, 5 CCH TRADE REG. REP. ¶ 72,712 (W.D. Wis. Aug. 1, 1968).

¹⁰⁷ *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566, 575 n.17 (4th Cir. 1963), quoting *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11, 15 (6th Cir. 1959).

CLAUSES EFFECTIVE UPON TERMINATION: "BUY-BACK" AND
"NON-COMPETE" AGREEMENTS

At times, franchise agreements include certain clauses which are intended to apply upon termination; two notable examples are the "buy-back" and "non-compete" clauses. Both are lawful, as long as they do not unfairly or unnecessarily restrict competition, and are not intended to enforce illegal written or oral arrangements.

The "buy-back" clause is particularly common and useful in those franchise arrangements involving trademarked or distinctively designed products or services. If the "buy-back" clause is so onerous that the dealer is effectively coerced into continuing a disadvantageous relationship, a court may find an unreasonable restraint of trade. It is clear that clauses covering the return of merchandise and equipment must be related to valid business reasons, and may not be invoked as part of a plan to keep the dealer tied to the supplier.

Similarly, so long as the restraint is reasonable, covenants forbidding the dealer to engage in a similar business for a period of time or within a limited geographical area have been enforced.¹⁰⁸ Only recently the FTC issued an advisory opinion approving a proposed franchise agreement between a trademark owner and individual pizza restaurant owners under the terms of which the franchisee would not operate a similar business within two miles of his former shop for two years after termination of the agreement.¹⁰⁹

IN PARI DELICTO AND THE TREBLE-DAMAGE ACTION

Mr. Justice Black's opinion in *Perma Life* is of greatest importance to the termination of franchise agreements on yet another ground. Formerly, it had been thought that a manufacturer who violated the antitrust laws in his distributorship arrangement, while subject to suit by the Government and unable to enforce his contract, was not usually subject to treble-damage penalties, since the *in pari delicto* defense was open to him. That defense has been used successfully since the turn of the century.¹¹⁰

Greatly simplified, the doctrine of *in pari delicto* holds that one wrongdoer cannot recover from his co-wrongdoer because they are equally at fault. *In pari delicto* is to be distinguished from the "unclean hands" equitable defense, where the defendant asserts an un-

¹⁰⁸ Day Companies v. Patat, 403 F.2d 792 (5th Cir. 1968), cert. denied, 393 U.S. 1117 (1969).

¹⁰⁹ Advisory Opinion Digest No. 278, 3 CCH TRADE REG. REP. ¶ 18,483 (1968).

¹¹⁰ Bishop v. American Preservers Co., 105 F. 845 (N.D. Ill. 1900).

related antitrust offense by the plaintiff as a bar to recovery. "Unclean hands" is not strictly applicable to legal cases and has never been recognized as a viable antitrust defense.¹¹¹ In turn, both are to be differentiated from the defense of "consent" where the plaintiff has voluntarily agreed to the violation.¹¹²

The defendants in *Perma Life* raised the *in pari delicto* defense, arguing that a plaintiff who agreed to the terms of the distributorship arrangement was equally at fault if the arrangement were held to contravene the antitrust laws. Mr. Justice Black, speaking for the Court, stated unqualifiedly that *in pari delicto* was not intended by Congress to be applicable to treble-damage actions, in light of the general purpose of Section 4 of the Clayton Act¹¹³ to encourage private enforcement of the antitrust laws:

Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.¹¹⁴

Although not stating so in explicit terms, Mr. Justice Black has turned *in pari delicto* into a form of consent, finding that consent was absent and that the plaintiff lacked any "fault" to be compared with that of the defendants. He stressed that the case did not present the situation "of equal fault", that each of the questioned provisions favored Midas, and that "the illegal scheme was thrust upon [the distributors] by Midas."¹¹⁵ In rebutting the contention that no one "forced" the plaintiff to agree to the franchise contract, Mr. Justice Black argued that participation in the franchise agreement, being on the whole voluntary, did not make agreement to particularly onerous

¹¹¹ *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

¹¹² The opinion of Mr. Justice Harlan makes explicit the distinctions between *in pari delicto*, "unclean hands" and "consent." 392 U.S. at 153-55. See Note, 78 HARV. L. REV. 1241 (1965).

¹¹³ 15 U.S.C. § 15 (1964), formerly 38 Stat. 731 (1914).

¹¹⁴ 392 U.S. at 139.

¹¹⁵ *Id.* at 141.

clauses voluntary; the dealers "did not actively seek each and every clause."¹¹⁶ It is at this point that Mr. Justice Marshall would apparently disallow the suit, on the ground that a contractor who "trades off" restrictions and then becomes disillusioned with the deal should not be allowed to come into court seeking a windfall as a treble-damage plaintiff.¹¹⁷ It is fair to say that, with five members of the Court writing opinions and only four joining in that of the Court, the exact delineation of the point at which suit will be barred is far from clear.

Professor Handler has seized on Mr. Justice Black's statement that "the doctrine of *in pari delicto* with its complex scope, concepts, and effects is not to be recognized as a defense to an antitrust action" to argue that the Court's current position is apparently that any conspirator can sue any other conspirator.¹¹⁸ But that does not appear to be what Mr. Justice Black meant and, if he did, in a proper case the Court may well back away from it. After all, *Perma Life* arose on summary judgment. If, after an analysis of the facts, it is apparent that the economic power lay with the manufacturer, the Court will probably adhere closely to its rejection of the defense. However, the *Perma Life* rationale may not be applied where the plaintiff and the defendant are relatively evenly matched and enter an unlawful combination with their eyes open.

One court has already followed the guidelines set forth in the concurring opinions in *Perma Life*. In finding that the plaintiff was a direct participant in a bid-rigging scheme,¹¹⁹ the court stated that a plaintiff who is "an originating, moving, active and aggressive party to the illegal bid-rigging scheme" is subject to the defense of *in pari delicto*: "Plaintiff in this case initially violated the law in an attempt to secure a public contract. Having failed, it now seeks not just refuge, but reward in this court. We find no sanctuary in the *Perma Life* decision for a plaintiff like this."¹²⁰

But total removal of the doctrine has not been accomplished. Justices Harlan and Stewart discussed specific situations in which they would apply something similar to the doctrine;¹²¹ Justices White and

¹¹⁶ *Id.* at 139.

¹¹⁷ *Id.* at 150.

¹¹⁸ Handler, *Through the Antitrust Looking Glass*, 23 RECORD OF N.Y.C.B.A. 601 (1968). See the broad, almost off-hand, statement by Judge John Lord in *Morton v. National Dairy Prod. Corp.*, 287 F. Supp. 735 (E.D. Pa. 1968); *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

¹¹⁹ *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 5 CCH TRADE REG. REP. ¶ 72,710 (N.D. Ill. Sept. 16, 1968).

¹²⁰ *Id.* at 86,540.

¹²¹ 392 U.S. at 153-56 (dissenting in part).

Fortas would compare the faults of the plaintiff and the defendant and, if the comparison proves fairly equal, deny recovery.¹²² And Mr. Justice White would have reversed and allowed recovery on the authority of *Eastman Kodak Co. v. Southern Photo Materials Co.*,¹²³ reasoning "that participation in an unlawful course of conduct would not bar recovery where the defendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement."¹²⁴ Thus, Mr. Justice White would ignore the technicalities and fine distinctions of the *in pari delicto* doctrine and look to the purposes of the private antitrust action, balancing the strong public interest in vigorous private antitrust enforcement and removal from the market place of coercive anti-competitive distribution agreements against the interest of not having the courts grant windfalls to a plaintiff who voluntarily, or even eagerly, entered into what is later held to be an illegal contract. Although section 4 is indeed a powerful and appropriate tool for enforcement of antitrust laws and maintenance of competition, the direct benefits of a successful section 4 case flow only to the plaintiff, and there remains room for consideration of his right and propriety to the treble-damage windfall.

Whatever balance is eventually achieved, the practical effect of *Perma Life* will be felt by franchisors. In most cases, especially where a trademark is involved, the economic power of the contracting parties is far from equal; Midas is not atypical. The prudent antitrust counselor will heed *Perma Life* and warn of the very serious effects of treble-damage exposure. Thus, the franchisor clearly can be sued by his former distributor notwithstanding the facts that the distributor agreed to the restrictions put in the contract and that he operated under the contract at a profit over many years.¹²⁵ Further, he may be the subject of an injunction which will order him to deal with that distributor, even though the latter does not fit in with his policies of good, business-like selling.

SOME POSSIBILITIES OF THE CLASS ACTION

If the franchising scheme as a whole appears to be legal or if the area of commerce affected by any illegality is small, it is unlikely that the manufacturer will be the subject of a government action to correct

¹²² *Id.* at 142-47, 147-48 (concurring opinions). See *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

¹²³ 273 U.S. 359 (1927).

¹²⁴ 392 U.S. at 142-43.

¹²⁵ Clearly it cannot any longer be said that "treble damage suits brought by cut-off dealers have uniformly failed." Barber, *Refusals to Deal under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 860 (1955).

minor anti-competitive features of the scheme. However, he remains subject to a treble-damage action by any person injured by any activity which violates the antitrust laws. The treble-damage claimant need only show a violation and that he was affected by it; and he need not give much concern to the fact that the violation does not affect competition outside a very small geographical vicinity or line of commerce.¹²⁶

Since the "class action" rule was amended in 1966, the threat posed by the treble-damage action has become much more serious.¹²⁷ In particular, the "opting out" clause of the rule brings into the action all those who are similarly situated to the named plaintiff and who do not affirmatively signify a desire to be excluded. That provision has put tremendous leverage on the side of the dealer-plaintiff, because he may now seek recovery, not only of *his* damages, but of damages sustained by all other dealers, many of whom would not otherwise have desired to commence litigation.

The amended Federal Rule 23(b)(3) permits a plaintiff to sue on behalf of all members of a class when questions of law or fact common to the members predominate over questions affecting only individual members, and the class action is superior to other available methods of adjudication.¹²⁸ A class of six hundred and fifty franchisees was held to be proper in *Siegel v. Chicken Delight, Inc.*,¹²⁹ although no other dealer had commenced any litigation or shown any interest in doing so.¹³⁰

The motives for bringing a class action are obvious, and include

¹²⁶ There is language in the cases to the effect that injury to the public must be shown. *Rogers v. Douglas Tobacco Bd. of Trade, Inc.*, 266 F.2d 636, 644 (5th Cir.), *cert. denied*, 361 U.S. 833 (1959); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268, 274 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954). But the violations which we have been discussing are, in the main, deemed to be injurious to the public. "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public." *Radovich v. National Football League*, 352 U.S. 445, 453 (1957).

¹²⁷ FED. R. CIV. P. 23.

¹²⁸ There are four prerequisites to any class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

¹²⁹ 271 F. Supp. 722 (N.D. Cal. 1967).

¹³⁰ For representative cases under amended FED. R. CIV. P. 23(b)(3), see *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *Philadelphia Elec. Co. v. Anaconda Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967); *School Dist. v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967); *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966).

The rule has generally been given a rather broad interpretation. Thus, in *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), six hundred and fifty franchisees were found to constitute a proper Rule 23(b)(3) class, notwithstanding certain individual peculiarities involving, in the main, ascertainment of damages.

the possibility of an enhanced settlement caused by the greater potential liability and the chance to distribute the costs of litigation among several plaintiffs. On the other hand, if settlement is a major consideration, desirability of the class-action allegation should be seriously weighed by the plaintiff because his representation of other parties will require the court to scrutinize the settlement closely to determine whether it is fair to the nonappearing members of the class, perhaps causing him to lose a substantial amount of control over his litigation.¹³¹ Furthermore, the scope of the action may well increase beyond what the representative plaintiff thinks is desirable, because both discovery and trial will take into consideration the factual situations peculiar to other dealers, especially in regard to computation of damages.

CONCLUSION

Because of the expanded potential liabilities of private treble-damage actions under Section 4 of the Clayton Act, the manufacturer who wishes to terminate a franchise agreement must be wary of the manner of the termination. Under *Perma Life* a franchisee may sue if he can prove he has been injured by an illegal clause in the agreement. Of course, the best defense is to strike any arguably illegal clause from the agreement in the first place. But, because manufacturers appear to desire such clauses and because the boundaries of illegality are not always clear,¹³² such clauses may still be found. Especially in light of expanding areas of antitrust enforcement in distributorship arrangements, it would be wise for any franchisor to review his contracts with a view toward insuring that they are not violative of the antitrust laws, both under the language of present decisions and under rules which reasonably can be anticipated to be enunciated by the courts.

Furthermore, the manufacturer is legally responsible for the methods used by his salesmen and district managers. Their overzealous "coercion" or their statements, however erroneous, that a particular dealer was cut off for failing to maintain the suggested price can be very strong evidence against the franchisor. That situation, of course, is most likely to occur to the supplier trying to walk the *Colgate-Parke, Davis* line. Perhaps the only preventive medicine that can be recommended is a continuing and vigorous educational program designed to make clear to the sales representatives the limits in controlling the dealers' actions and the seriousness of the consequences of any miscon-

¹³¹ FED. R. CIV. P. 23(e).

¹³² Compare *White Motor Co. v. United States*, 372 U.S. 253 (1963), with *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

duct. It has become clear that the courts will scrutinize very closely the "business motives" of franchise termination whenever there is any indication that resale price maintenance or failure to live up to anticompetitive clauses of the franchise agreement are at the root of the termination. Thus, if termination does become necessary and the potential for antitrust liability is present, the manufacturer should make it clear in his own records and to the dealer that there are valid business reasons for the termination.

The franchisee must also understand that intra-brand competition is mandated and schemes designed to cut out one or more types of competition will be held illegal. He, and the associations he joins, are not free from government or treble-damage exposure. Probably a combination of dealers could be held liable for treble damages to discount houses or any class of actual or potential competitors foreclosed from the market by combining dealers. In some cases it may even be the manufacturer who "goes free."